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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HAMILTON WHITFIELD,

Defendant and Appellant.

C077635

(Super. Ct. No. CRF132464)

A jury found defendant David Hamilton Whitfield guilty of carrying a concealed dirk or dagger. (Pen. Code, § 21310.)¹ In a bifurcated proceeding, the trial court found true the special allegation defendant had a prior foreign conviction that qualified as a strike under California's three strikes law. (§ 1170.12.) The trial court sentenced defendant to serve four years in prison. On appeal, defendant contends there was insufficient evidence to support the trial court's strike finding. We agree and shall

¹ Undesignated statutory references are to the Penal Code.

reverse the judgment as to the trial court's true finding regarding the strike allegation and remand for further proceedings. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL HISTORY

After defendant waived his right to a jury, the trial court in this case conducted a bench trial on the strike allegation alleging a prior manslaughter conviction in Florida. The trial court received into evidence People's Exhibit 8 that consisted of a 34-page document including two probable cause affidavits for an arrest warrant, the indictment, court minutes, the plea agreement, the judgment, three notices of appeal (from denials of post-conviction relief), and three per curiam orders affirming the denial of post-conviction relief. Defendant's counsel objected to admission of the two probable cause affidavits based on hearsay and lack of foundation. The trial court admitted the documents as certified official records.

The trial court found true the special allegation that defendant's 1994 conviction for violating Florida Criminal Code section 782.07 (manslaughter) qualifies as a strike under California law. In so finding, the trial court stated: "It is true that we don't know how Florida defines manslaughter, but I believe that the Court can infer that manslaughter involves the taking of a life, and for that reason, the court concludes that it would qualify as a strike, because any felony in which a defendant inflicts great bodily injury--of which death would be--is a strike under [section] 667.5 [(violent felony)], and probably under [section] 1192.7 [(serious felony)] as well." On appeal, defendant contends the trial court erred in making this finding because the record contains insufficient evidence to support the conclusion his Florida manslaughter conviction qualifies as a strike under California law.

DISCUSSION

I

Insufficiency of the Evidence

Under California's three strikes law, a defendant's sentence is enhanced upon proof the defendant has been previously convicted of a strike--a "violent felony" as defined in section 667.5, subdivision (c), or a "serious felony" as defined in section 1192.7, subdivision (c). (§§ 667, subd. (f)(1), 1170.12, subd. (d)(1).) If a crime is not among the crimes listed in those statutory provisions, it qualifies as a serious felony within the meaning of section 1192.7, subdivision (c), when it "involve[s] the personal infliction of great bodily injury on any person, other than an accomplice." (§ 1192.8, subd. (a); see § 1192.7, subd. (c)(8).)

“ ‘ “In order for a prior conviction from another jurisdiction to qualify as a strike under the Three Strikes law, it must involve the same conduct as would qualify as a strike in California” ’ [citation], and the statutory elements of the foreign crime must include all the elements of the California strike offense [citation]. ‘There is, however, no guarantee the statutory definition of the crime in the other jurisdiction will contain all the necessary elements to qualify as a predicate felony in California.’ [Citation.] Thus, if the foreign law can be violated in different ways, and ‘ “the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law.” [Citation.]’ ” (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1024 (*Denard*).)

We review defendant's challenge to the trial court's strike finding in accordance with the usual rules on appeal applicable to claims of insufficient evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Cortez* (1999) 73 Cal.App.4th 276, 279.) “ ‘The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the

light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ ” (*Ochoa*, at p. 1206.)

We conclude the evidence was insufficient to establish defendant’s Florida manslaughter conviction qualifies as a strike under California law. At the time of defendant’s prior conviction, Florida law defined manslaughter as: “The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification . . . and in cases in which such killing shall not be excusable homicide or murder . . . is manslaughter” (Fla. Stat. § 782.07(1).) “In California, voluntary manslaughter is defined as ‘the unlawful killing of a human being without malice . . . [¶] . . . upon a sudden quarrel or heat of passion.’ [Citation.] Involuntary manslaughter is a killing that occurs ‘in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.’ [Citations.] ‘ “The words ‘without due caution and circumspection’ refer to criminal negligence--unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences. [Citation.]” ’ [Citation.] Voluntary manslaughter is a ‘serious felony’ under section 1192.7, subdivision (c)(1), and thus qualifies as a strike, while involuntary manslaughter is not considered to be a ‘violent’ or ‘serious’ felony, and thus does not qualify as a strike. [Citations.]”² (*Denard, supra*, 242 Cal.App.4th at p. 1027.)

Since a violation of the Florida manslaughter statute may constitute either voluntary or involuntary manslaughter under California law, the fact of defendant’s conviction for manslaughter does not by itself establish that the crime qualifies as a prior

² Voluntary manslaughter is also a violent felony under section 667.5, subdivision (c).

serious or violent felony under the three strikes law. (See *Denard, supra*, 242 Cal.App.4th at p. 1027.) Nor does a violation of the statute by itself establish defendant's manslaughter conviction involved the personal infliction of great bodily injury on any person other than an accomplice. By pleading to the manslaughter charge, defendant admitted another person was killed as a result of an "act, procurement, or culpable negligence" attributable to him. But the fact defendant caused the death of another person does not establish he *personally inflicted* great bodily injury *on any person other than an accomplice*. (See § 1192.8, subd. (a).)

"[P]roximate causation and personal infliction are two different elements." (*People v. Wilson* (2013) 219 Cal.App.4th 500, 512.) " 'Proximately causing an injury is clearly different from personally inflicting an injury.' [Citation.] 'To "personally inflict" an injury is to directly cause an injury, not just to proximately cause it. . . .' [Citation.]" (*People v. Bland* (2002) 28 Cal.4th 313, 337.) " 'We think it obvious that *an individual can and often does proximately cause injury without personally inflicting that injury*. . . .' [Citation.]" (*Ibid.*; see *People v. Valenzuela* (2010) 191 Cal.App.4th 316, 321 ["proof a defendant proximately caused great bodily injury does not constitute proof the defendant personally inflicted such injury"].)

The Florida record of conviction admitted into evidence consisted of two probable cause affidavits for an arrest warrant, the indictment, court minutes, the plea agreement, the judgment, three notices of appeal (from denials of post-conviction relief), and three per curiam orders affirming the denial of post-conviction relief. Only the probable cause affidavits describe the facts of the underlying crime. On this record, the evidence is insufficient to establish defendant personally inflicted the injuries that killed the manslaughter victim. While defendant was charged with second degree murder for "unlawfully kill[ing] Michael Fincher . . . by stabbing him with a knife," defendant did not plead guilty to that offense. Instead, he pleaded guilty to manslaughter, and therefore only admitted to the elements of that offense. (*People v. Saez* (2015) 237 Cal.App.4th

1177, 1206 (*Saez*) [a guilty plea admits every element of the crime charged, but no more].) There is no evidence defendant admitted to stabbing the victim as a basis for his plea. The record reflects defendant waived his right to have the factual basis showing his guilt recited before the trial court that accepted his plea. Accordingly, the record does not support the conclusion defendant personally inflicted the injuries that killed the manslaughter victim. Further, the evidence is insufficient to establish the victim was someone other than an accomplice in the crime. The charging document does not describe the victim's status, and no evidence was submitted foreclosing the possibility the victim was an accomplice. (See *People v. Henley* (1999) 72 Cal.App.4th 555, 561-562 [prosecutor failed to prove injured party was not an accomplice where neither the plea transcript nor the complaint mentioned the injured party's status, and the prosecutor did not present any evidence to prove the injured party was not an accomplice].)

To the extent the trial court relied on statements made in probable cause affidavits to enhance defendant's sentence, this was error. To determine whether defendant's Florida manslaughter conviction meets the elements of voluntary manslaughter in California, and thus qualifies as a strike, the court is limited to an examination of the record of the prior conviction. (*People v. McGee* (2006) 38 Cal.4th 682, 691, 694 [inquiry into basis of prior conviction is limited to examining court documents].) To make this showing, the People cite the probable cause affidavits prepared by a Florida police officer following the incident giving rise to defendant's Florida manslaughter conviction. The People contend the affidavits show defendant personally inflicted great bodily injury upon someone other than an accomplice because they establish defendant killed the manslaughter victim with a knife over a disputed drug transaction. However, the affidavits were prepared for the purpose of obtaining an arrest warrant for second degree murder. As such, they set forth the basis for an offense of which defendant was not convicted. The record does not reflect the affidavits were attached to the charging document or were presented to the court at the time of the conviction. Nor is there any

evidence defendant stipulated to or admitted the facts alleged in the affidavits at the time of conviction. Accordingly, the documents cannot be considered part of the record of conviction and cannot be used to prove defendant's manslaughter conviction qualifies as a strike under California law. (*Denard, supra*, 242 Cal.App.4th at pp. 1028-1029 [concluding Florida probable cause affidavit could not be considered part of the record because the affidavit "could hardly be deemed a reliable account of the conduct underlying the offense for which [defendant] was convicted"].)³

Moreover, even if the probable cause affidavits could be considered by the trial court, reliance on them to enhance defendant's sentence would violate the Sixth Amendment under the principles announced by the United States Supreme Court in *Descamps v. U.S.* (2013) 570 U.S. ____ [133 S.Ct. 2276, 186 L.Ed.2d 438]. (See *Denard, supra*, 242 Cal.App.4th at pp. 1030-1034 [concluding the Sixth Amendment prohibits a trial court from relying on a probable cause affidavit as the basis for determining the defendant's prior conviction qualifies as a strike under California law]; *Saez, supra*, 237 Cal.App.4th at pp. 1205-1208 [concluding the trial court violated the Sixth Amendment by relying on the probable cause affidavit to increase the defendant's sentence].)⁴

³ (Cf. *Saez, supra*, 237 Cal.App.4th at pp. 1197-1198 [holding probable cause affidavit was part of the record of conviction because the defendant stipulated the complaint that included the attached affidavit was the factual basis for his guilty plea].) In a footnote, the *Saez* court explained the police officer's statements in the affidavit would not have been part of the record of conviction and would have been inadmissible hearsay had the defendant not stipulated to the complaint as the factual basis for his plea. (*Id.* at p. 1198, fn. 18.)

⁴ In light of these conclusions, we will not consider defendant's arguments regarding the hearsay rule and the right to confront witnesses.

II

Retrial of Strike Allegation

The People contend remand for retrial of the strike allegation is appropriate but do not identify any evidence in the prior record of conviction beyond that previously found to be insufficient. At oral argument, defendant's counsel stated nothing suggests there is anything else in the prior record of conviction. Based on this record and the arguments, we conclude it is unknown whether there is additional evidence in the prior record of conviction that could support a prior strike finding. Remand for retrial is the proper procedure. (*People v. Scott* (2000) 85 Cal.App.4th 905, 915-916.)

In the event the People are able to obtain documents that are part of the record of conviction that reliably reflect the facts of defendant's Florida manslaughter conviction and elect to retry the strike allegation, we conclude the Sixth Amendment entitles defendant to a jury trial on the issue of whether he personally inflicted great bodily injury on a person other than an accomplice. (*Denard, supra*, 242 Cal.App.4th at pp. 1030-1034; *Saez, supra*, 237 Cal.App.4th at pp. 1205-1208.) Here, the record reflects that, in entering his guilty plea, defendant did not waive his right to a jury trial as to such facts and admit them. Nor were such facts found true by the trial court with defendant's assent. The plea agreement does not recite the factual basis for defendant's plea, and defendant waived his right to have the factual basis showing his guilt recited before the trial court that accepted his plea. Accordingly, on remand, if the prosecution seeks to prove defendant personally inflicted great bodily injury on a person other than an accomplice by resorting to documents in the record of conviction other than those in the appellate record, defendant is entitled to a jury trial.

DISPOSITION

The judgment is reversed as to the trial court's true finding regarding the strike allegation. We vacate defendant's sentence and remand for further proceedings. The People may elect to retry the strike allegation by presenting additional evidence within

the record of conviction. If the People opt to retry the strike allegation, defendant is entitled to a jury trial as to whether in his prior Florida manslaughter conviction he personally inflicted great bodily injury on a person other than an accomplice. If the People opt not to retry the prior strike allegation, the trial court shall enter a “not true” finding regarding the strike allegation. In any event, the trial court shall resentence defendant. In all other respects, the judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
MAURO, Acting P. J.

_____/s/
MURRAY, J.